

**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

**September 27, 2004**

**In Reply Refer To:**  
1800B3-IB/GDG

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1776 K Street, NW  
Washington, D.C. 20006

In re: WSNR(AM), Jersey City, NJ  
Facility ID No. 61643  
File No. BMP-20011203AAM

Dear Counsel:

This letter concerns the uncontested request ("Request") of Rose City Radio Corporation ("Rose City"), filed May 27, 2004, supplemented ("Supplement") on July 7, 2004, and amended ("Amendment") at the staff's request on September 1, 2004. Rose City seeks a waiver of the Commission's construction period rule, 47 C.F.R. § 73.3598(a), to modify the referenced permit's construction deadline. For the reasons detailed below, Rose City's waiver request is denied.

Background. Rose City has been licensed since December 10, 2001, to serve Jersey City, New Jersey from a 5-tower array on a site within the New Jersey Meadowlands District in Lyndhurst, New Jersey. In September of 2001, the New Jersey Meadowlands Commission ("NJMC") indicated its intention to condemn the Lyndhurst site for eventual recreational and business redevelopment.<sup>1</sup> On December 3, 2001, Rose City applied to relocate WSNR's transmitting facilities to Pine Brook, New Jersey, on property outside of NJMC's jurisdiction.

On June 2, 2003, the staff approved the Pine Brook modification application, requiring that Rose City complete construction and file a covering license application no later than June 2, 2006. Soon after the permit's grant, Rose City discovered a conservation easement it claims precludes this construction.<sup>2</sup> Rose City commenced a

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<sup>1</sup> Rose City reports that the condemnation process concluded with a court's February 22, 2004, Declaration of Taking and with the subsequent settlement between the site owner and NJMC fixing compensation for the condemned property. *Supplement* at Attachment 5. Rose City apparently is still operating from the Lyndhurst site, however, as it has not notified the Commission of any silence in accordance with 47 C.F.R. § 73.1740(a)(4).

<sup>2</sup> *Request* at 2.

search for alternate sites, focusing its efforts first on a site at Oritani Marsh, situated on property within NJMC's jurisdiction. In late August, 2003, NJMC instructed Rose City to redirect its site search to co-locate with WBBR(AM), New York, New York, at another location (the "Bloomberg Site") within NJMC's jurisdiction.<sup>3</sup> Rose City indicates that it has negotiated with WBBR since August of 2003, but that the parties have not reached a definitive site use agreement. Nevertheless, Rose City applied (File No. BMP-20040326ALI) on March 26, 2004, to construct WSNR's modified facilities at the Bloomberg Site.<sup>4</sup>

Rose City asks that the staff waive the Commission's construction period rules to consider construction encumbered either from August of 2003, when NJMC ordered Rose City to halt consideration of the Oritani March site, or from April 13, 2004, the date the U.S. Department of the Interior filed comments with the FCC raising certain environmental issues associated with Rose City's pending Bloomberg Site application.<sup>5</sup>

Discussion. Section 73.3598(a) of the Commission's rules requires completion of authorized construction within three years from the date of issuance of the construction permit. It is well established, however, that the Commission can waive this rule if there are "rare and exceptional" circumstances beyond a permittee's control preventing completion of construction.<sup>6</sup> Requests for such waivers must be filed as promptly as possible following the event upon which the request is based, generally within the same 30-day period required for tolling notifications.<sup>7</sup>

Rose City's sole outstanding construction permit is the Pine Brook authorization. Virtually all of Rose City's waiver arguments erroneously focus on events that do not directly involve the Pine Brook permit. For example, while we do not question Rose City's claim that it faces eminent domain at its licensed site or that it has experienced difficulties obtaining local approvals of the Oritani Marsh and Bloomberg sites, none of those matters would encumber Rose City's ability to construct at Pine Brook.

With respect to difficulties at Pine Brook, Rose City identifies only the conservation easement, which was discovered in a title search conducted after grant of the permit. In establishing the basis for grant of additional construction time, however,

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<sup>3</sup> *Request* at 2-3.

<sup>4</sup> It is not entirely clear whether Rose City is still claiming site assurances sufficient to pursue the pending application. If Rose City had such assurances when it applied but has since lost those assurances, it would be required to amend pursuant to 47 C.F.R. § 1.65.

<sup>5</sup> *Request* at 5.

<sup>6</sup> *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056 (1998), *recons. granted in part and denied in part* 14 FCC Rcd 17525, 17541 (1999) ("*Streamlining MO&O*").

<sup>7</sup> *Birach Broadcasting Corporation*, 18 FCC Rcd 1414, 1416 (2003).

the Commission specifically placed sole responsibility on the applicant for specifying a tower site that will enable prompt initiation and conclusion of construction.<sup>8</sup> The Commission would not grant additional time for delays resulting from the failure of an applicant to designate a site suitable for its intended purpose.<sup>9</sup> Rose City's difficulties at Pine Brook were not beyond its control. Rose City received consent of the owner of the Pine Brook site prior to filing for the Pine Brook site in December of 2001, but did not investigate whether there were other factors that would adversely affect the site's availability. After the permit's grant in June of 2003, Rose City discovered the conservation easement.<sup>10</sup>

The deed to the property, dated December 3, 1986, and registered with the local land use officials, clearly states that conveyance of the deed to another party is subject to the terms and conditions in the annexed conservation easement.<sup>11</sup> This information would have been available to Rose City when it applied to relocate to Pine Brook, had Rose City initiated a title search. The decision to proceed otherwise was a private business decision entirely within Rose City's control, and therefore does not warrant waiver of our construction period rule.

Accordingly, Rose City's request for waiver of the Commission's construction period rule, 47 C.F.R. § 73.3598(a), IS DENIED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>8</sup> *Streamlining MO&O*, 14 FCC Rcd at 17539.

<sup>9</sup> *Id.*

<sup>10</sup> *Amendment* at 2.

<sup>11</sup> *Supplement* at Attachment 6.